2000

Rolf Salm v. The Third Judicial District Court of the State of Utah : Brief of Petitioner

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

ROLF SALM,

Plaintiff-Petitioner,

-vs-

THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF UTAH,

Defendant.

Case No. 14504

BRIEF OF PLAINTIFF-PETITIONER

ARGUMENT

There was a total lack of evidence upon which to base an indictment.

The only statement made before the Grand Jury was made by the alleged victim, Gayleen VanWagoner, in response to the question "Can you describe that other gentleman, please?". (Assuming for their argument that the other gentleman was the same as the person allegedly holding her) That statement is as follows: "Yes. He was oh, probably about the same height as Mr. Strehl. He was a thinner built person. He had a very large nose and I don't know why, but I guessed just unless they are like this it seemed like his teeth were you know, decayed in the front. It looked like he hadn't shaved for maybe two

days and he had quite a lot of hair. It was just in a natural curl." This description could refer to many hundreds of persons in the State of Utah alone. The description in fact does not match Rolf Salm, whose nose is only of average size, whose teeth are not decayed in front, who is five inches shorter than Mr. Strehl, who does not have any more hair than one would expect on a man of his age, and whose hair is no more than slightly curly.

§77-19-3 says "Evidence receivable. -- In the investigation of a charge for the purpose of indictment the Grand Jury must receive no other evidence than such as shall be given by witnesses produced and sworn before them, or furnished by legal documentary evidence, or the deposition of a witness as provided in §77-1-8. The Grand Jury must receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence." The above statement of Gayleen VanWagoner is the only evidence set out in the Bill of Particulars which could qualify as receivable under §77-19-3.

The protections of §77-19-3 can only be guaranteed to the Defendant by way of a Bill of Particulars. There is no other way a Defendant can ascertain if the evidence that the Grand Jury received and based its indictment on was receivable except through a Bill of Particulars provided by the prosecuting attorney. §77-19-3 also states that this evidence is the only evidence the Grand Jury may receive.

The statement of Gayleen VanWagoner, which is the only evidence received by the Grand Jury is in effect a total lack

of evidence.

Total lack of evidence is ground of quashal of an indictment.

§77-23-3: A motion for quashal is available only on one or more of the following grounds. (1)(e) That it appears from a Bill of Particulars . . . that the Defendant did not commit the offense. An extremely literal reading of this statute could lead to the interpretation that an indictment could be quashed only if the Bill of Particulars contains affirmative evidence that the Defendant did not commit the offense. This construction is totally unreasonable because it is virtually inconceible that a prosecutor would submit a Bill of Particulars containing affirmative evidence that the Defendant did not commit the offense. In fact, under this construction anyone's name could be substituted for the Defendant's and that person would not qualify for quashal. This is clearly not the intent of the legislature. The only reasonable intrepretation is that a motion to quash is available if it appears from the Bill of Particulars that there was no evidence against the Defendant or a total lack of evidence.

This is strenghthened by the majority rule in the United States. While it is clear that mere inadequacy of evidence is not sufficient ground for quashing an indictment, the weight of authority is that an indictment will be quashed it there is a total lack of evidence upon which the indictment can rest. "It is a generally recognized rule that an indictment will be quashed, dismissed, or set aside by the court on motion

their reach will explain away the charge." There are no Utah cases construing this statute, but the Supreme Court of California has recently had occasion to consider a virtually identical statutory provision.

> §77-19-4. The grand jury shall not be bound to hear evidence for the defendant; but it is their duty to weigh all the evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge, they should order such evidence to be produced, and for that purpose may require the prosecuting attorney to issue process for the witnesses.

> §993.7 of the Penal Code of California. "The grand jury is not required to hear evidence for the defendant, but it shall weigh all the evidence submitted to it, and when it has reason to believe that other evidence within its reach will explain away the charge, it shall order the evidence to be produced, and for that purpose may require the district attorney to issue process for the witnesses."

In Johnson v. Superior Court of San Joaquin County 15 Cal. 3d 248, 539 P.2d 742, 124 Cal. Rptr. 32 (1975), the court held that the district attorney is required to present any evidence which may be exculpatory to the grand jury. In that case, the prosecution had originally proceeded by way of information, and a preliminary hearing was held at which the defendant presented evidence. The magistrate resolved conflicts in evidence in defendant's favor, and dismissed the information. The district attorney then went before the grand jury and failed to disclose evidence favorable to the defendant (most importantly, the defendant's own testimony), of which he was aware.

The facts of Johnson v. Superior Court are virtually identical to the present case. In this case the prosecution

of the accused where there is no evidence whatever before the Grand Jury tending to support the charges contained on the indictment." 41 Am.Jur. 2d 1028, (see also Annotation 31 ALR 1485 cases cited therein and late case service to that annotation).

A consideration of the relevant policy factors also indicates that Utah should adopt the majority rule. To require a Defendant to stand trial on a criminal indictment which is totally unsupported by the evidence would subject him to an exceedingly heavy burden of ignominy, expense and time (not to mention possible interferences with his personal liberty) while the State would receive no offsetting benefits. In fact, such proceedings could be a serious detriment to the State, since they are expensive, tend to further over-burden the judicial system, and may increase public disrespect for the legal system.

In addition, quashing the indictment places no great burden on the prosecution since the prosecution may still proceed by information and is not precluded from getting another indictment if it can show grounds therefor.

The prosecutor knew of exculpatory evidence reasonably tending to negate defendant's guilt and was obliged to inform the Grand Jury of its nature and existence so that the Grand Jury could exercise its power under §77-19-4 and order the evidence produced.

§77-19-4 while providing that a Grand Jury is not required to hear the defendant's evidence, nevertheless places upon the Grand Jury the "duty to weigh all the evidence . . . when they have reason to believe that other evidence within

originally proceeded by way of information, and a preliminary hearing was held at which the defendant presented evidence. The judge resolved the conflicts in the defendant's favor and dismissed the information. The prosecutor then went before the Grand Jury and failed to disclose evidence favorable to the defendant (most importantly the defendant's own testimony), of which he was aware.

In Johnson v. Superior Court the court reasoned that if a prosecutor fails to inform the Grand Jury of evidence facorable to the defendant, the Grand Jury's obligation to order evidence produced which migh tend to explain away the charge would be impossible to fulfill since the Grand Jury is usually unaware of the existence of evidence not presented to it by the prosecutor. As the court stated, "if the district attorney does not bring exculpatory evidence to the attention of the Grand Jury, the Jury is unlikely to learn of it. We hold, therefore, that when a district attorney seeking an indictment is aware of evidence reasonably tending to negate guilt, he is to inform the Grand Jury of its nature and existence so that the Grand Jury may exercise its power under the statute to order the evidence produced."

A total lack of evidence is grounds for quashal and there was a total lack of evidence presented to the Grand Jury in this case. In addition, the failure of the prosecutor to divulge exculpatory evidence to the Grand Jury is ground for quashal. Either of the above is sufficient to require a quashal of the indictment, however, the district court refused to quash

in the fact of both of these and, therefore, the Defendant prays this court to grant a Writ of Prohibition against the Third Judicial District Court or any other duly constituted Court in the State of Utah, prohibiting any further proceedings against Salm in Criminal Case No. 28321, State v. Strehl and Salm.

DATED this 15th day of April, 1976.

L. M. HAYNIE

CERTIFICATE OF MAILING

I hereby certify that this 15th day of April, 1976, I mailed a copy of the foregoing Brief, postage prepaid, to the Salt Lake County Attorney, 240 East 4th South, Salt Lake City, Utah 84111, and Sumner J. Hatch, 370 East 500 South, Salt Lake City, Utah 84111.